United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

F005

No. 21,031

WILLIE E. PENDERGRAST,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILTON A. KALLIS
(Attorney for Appellant
appointed by Order of
this Court)
743 Washington Building
1435 G Street, N. W.
Washington, D. C. 20005
Telephone: 783-1950

STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellant, the following questions are presented:

1. Whether there is probable cause for an arrest without a warrant and before a search when the arresting officer does not see an offense committed, does not know eitner the accuser or the accused, and does not have reason to (a) credit the statement of the accuser and (b) discredit that of the accused when the accuser is excited and agitated and probably under the influence of alcohol and the accused is calm, cooperative, courteous and responsive and exhibits no indication of guilt by his appearance, conversation or demeanor.

2. Whetner the trial judge commits reversible error when, over objection, he permits the prosecutor to address the defendant as "Mr. Defendant" rather than by his proper name.

3. Whether a jury instruction satisfies the requirements of the Bill of Rights where, in the trial of a person charged with robbery, the judge instructs the jury that it may find the defendant guilty merely on the basis of unexplained possession of stolen property and the instruction is confusing, misleading and ambiguous and authorizes the jury to reject the

defendant's true explanation of his possession if it is contradicted and where the instruction does not furnish any criteria for such contradiction.

4. Whether such instruction satisfies the Bill of Rights requirements when it subjects the defendant's explanation of his possession to a more burdensome measure of persuasion than that imposed on the prosecution and thus shifts to the defendant the burden of proof on an essential and operative issue.

5. Whether such instruction exempts the prosecution from the burden of proof beyond a reasonable doubt on the entire case, including disproof of the defendant's categorical proof of his innocence, and thus shifts the burden to the defendant on the issue of the conflicting explanations by the prosecution and the defense, respectively, of the defendant's possession when such respective explanations comprise the very essence of the proof of guilt or innocence, respectively.

6. Whether a conviction for robbery is valid when (a) the defendant charged with this offense asserts his innocence, (b) the victim cannot identify the robber and (c) the only other person present at the offense testifies that the defendant did not rob the victim.

SUBJECT INDEX

TABLE OF AUTHORITIES

* Cases and authorities chiefly relied upon are marked by an asterisk.

* Cases and authorities chiefly relied upon are marked by an asterisk.

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,031

WILLIE E. PENDERGRAST,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

The appellant was indicted on two counts of robbery. A trial resulted in the conviction of the appellant on both charges. Subsequent to the sentence on April 21, 1967, the appellant filed an application for allowance, in forma pauperis, to appeal to this Court. The District Court granted

the application on May 8, 1967. The jurisdiction of this Court is asserted under 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

The appellant was indicted in two counts for the crime of robbery in violation of 22 D.C. Code 2901. He was tried and convicted on each of the two counts. The testimony and proceedings were as follows:

The case relates to two alleged simultaneous robberies by the appellant on February 19, 1966 of one Grady Johnson and of one Henry Ussery, respectively. The appellant denied each alleged robbery. He will hereinafter designate (1) the testimony received on the hearing of the motion to suppress as "T. Motion," (2) the testimony received on February 21, 1966 as "T.Vol. I" and (3) the testimony received on February 23, 1966 as "T.Vol. II."

On Saturday morning, February 19, 1966 at about 12:30 A.M., robberies and assaults were allegedly committed on Grady Johnson and Henry Ussery in the 1600 block of F Street, N.E. in the District of Columbia. While on the street they were attacked by a group of between six and eight young males. During the scuffle $12, a wallet and a wrist watch were taken from Johnson and a wrist watch and a pen knife were taken from Ussery.

Immediately prior to this episode Johnson and Ussery had been visiting at a residence at the corner of 16th Street and F Streets, N.E. While together there they had been drinking. Johnson testified that they were drinking from 11:00 P.M. to 12:30 A.M., and that he and Ussery consumed one pint of whiskey and two servings of beer. (T.Vol. I 83) Ussery testified that during the period 9:00 P.M. and midnight he and Johnson drank a few servings of beer and a half pint of whiskey. (T.Vol. I 31)

Within fifteen minutes after the robbery and while Johnson and Ussery were still at the location where it occurred, the police received a report of a shooting in the same block and proceeded promptly to this area. Within minutes several police cars carrying policemen arrived at the scene. (T.Vol. I 65, 73-74, 90, 98, 119-120) By this time a group of from ten to fifteen persons had gathered on the street and sidewalk and were watching the activities of the police. (T.Vol. I 5-6, 50, 72-73, 119, 122)

Among the spectators was the appellant. (T. Motion 6) He was standing casually and unrestrained beside Police Officer Arthur Delaney, the driver of a squad car which had responded to the report. (T.Vol. I 6, 94, 100, 102, 121, 122, 171) During this time Officer Rudolph Scipio, his partner, was on the porch

of a house. He then joined Delaney. Ussery thereupon approached Scipio, pointed to the appellant and said that the appellant had robbed him. (T. Motion 7, Vol. I 120) Ussery did not know the appellant and had never seen him before that morning. (T.Vol. I 50) He stated that he was positive in his identification but at this moment he was excited and agitated. (T. Motion 7, Vol. I 100, 123)

Officer Scipio testified that "I believe Mr. Ussery had been drinking at that time" and that Ussery "may have told me that he had been drinking." (T.Vol. II 55) Ussery appeared to the officer to have less self-control than did the appellant who acted in a polite, cooperative, and gentlemanly manner, although he firmly denied robbing Ussery and he resented the accusation. (T. Motion 8, 10, Vol. I 102, 121, Vol. II 124) The appellant did not try to escape. (T. Motion 10) Officer Scipio asked the appellant what he was doing in the area (T. Motion 8). The appellant replied that he had been attending a party in the block, needed some fresh air, went outside for a walk and was just returning to the party. (T Motion 8, Vol. I 122) Without further ado, Officer Scipio then placed the appellant under arrest (T. Motion 4,9,T.I 110,) and searched him. (T.Vol II 9)

In the appellant's possession were (a) the watch Johnson said had been stolen from him and (b)

the watch and pen knife Ussery said had been taken from him. (T. Motion 9) The appellant told the arresting officer that he found the two watches and knife on the street while taking the walk. (T. Vol. I 129) The appellant did not have possession of the $12 and wallet Johnson said were stolen from him. (T.Vol. II 123

The record is devoid of evidence which shows that the appellant robbed Johnson of the watch, wallet and $12 he said were stolen from him during the struggle. Johnson was unable to identify any of the assailants. (T.Vol. I 79, 86-87, 90) And Ussery testified that the appellant did not take part in assaulting or robbing Johnson. (T.Vol. I 55)

Prior to and during the trial the appellant moved to suppress evidence of the two watches and the knife in his possession when he was arrested. The court denied this motion.

During the prosecutor's cross-examination of the appellant the following colloquy occurred (T.Vol. II 23-24):

CROSS-EXAMINATION

BY MR. COLLINS:

Q Mr. Defendant, you were living at 1246 Eye Street, Northeast?

MR. SHANKS: His name is Mr. Pendergrast, Mr. Prosecutor.

THE COURT: Wait just a moment. If you have any comments direct them to the Court. It is perfectly permissible to the counsel to refer to the defendant as "Mr. Defendant" or by his proper name.

MR. COLLINS: May I proceed?

THE COURT: Yes

BY MR. COLLINS:

Q Mr. Defendant, you were living at 1246 Eye Street, Northeast, is that right?

A Yes, sir.

Prior to the court's instructions the trial counsel for the appellant objected to an instruction relating to recent possession of stolen property. He stated that on the record and in the particular context such an instruction would be both prejudicial and unessential. The trial judge overruled this objection. His instruction on this point is set forth on pages 95-97 of Volume II of the transcript and is reproduced in full as Appendix A.

STATEMENT OF POINTS

1. The police officer lacked sufficient information to have probable cause to arrest the appellant.

2. The trial judge should have granted the motion to suppress the evidence obtained by the search following the arrest.

3. The trial judge should have ruled that the prosecutor must address the appellant by his proper name and not as "Mr. Defendant."

4. The trial judge's instruction, over the appellant's objection, on the permissible inference of guilt based on appellant's possession of recently stolen property was prejudicial.

5. This instruction erroneously shifted the burden of proof to the appellant on the explanation of his possession of the recently stolen articles.

6. The evidence fails to support the appellant's conviction of robbery of Johnson.

SUMMARY OF ARGUMENT

A. Admissibility of evidence obtained by search following arrest without probable cause.

The officer who arrested the appellant did not know him or his accuser. The arrest occurred when the appellant was one of a group of several policemen and several other persons who had gathered outside a residence where a shooting was reported to have occurred. While standing next to a policeman and without arousing any suspicion the appellant was accused of robbery by an excited and agitated person, probably under the influence of alcohol. In a calm, courteous, responsive and cooperative manner the

appellant denied guilt. There was a complete absence of any factor which would favor the accuser's statement and disfavor that of the accused. The arresting officer did not have enough information to justify a belief that the appellant was lying and that his accuser was telling the truth. The arrest was therefore without probable cause and the evidence obtained by a search thereafter should have been suppressed.

B. Prosecutor's addressing defendant as 'Mr. Defendant.'

During the cross-examination of the appellant the prosecutor addressed him as "Mr. Defendant" instead of his true name. The trial court committed prejudicial error in overruling defense counsel's objection to this courtroom tactic and in permitting the prosecutor to continue this objectionable form of address.

C. The jury instruction on permissible inference of guilt based on possession of stolen property.

1. The judge's instruction was prejudicial in terms of (a) being ambiguous, confusing and misleading and (b) authorizing the jury to reject the appellant's explanation of his possession, if contradicted. Since such explanation could be true even though contradicted and since the trial judge did

not instruct the jury as to the criteria of contradiction of an explanation, the net effect was improperly to shift the burden of proof to the appellant.

2. Both the eyewitness to the alleged robbery and the appellant explained the latter's possession of the stolen property. The former said he perceived the latter steal a watch and a pen knife in evidence. The latter said he found these items on the street. This kind of irreconcilable conflict between two persons who testify as eyewitnesses to an event should preclude the use of the permissible-inference procedure and thus prevent the shifting of the burden of proof which goes to the very issue in the case. The fact situation here is basically different from that where admittedly only one party is peculiarly and exclusively in possession of the material facts in issue and should therefore present them at the risk of an unfavorable inference against him on his failure to do so.

D. The insufficiency of the evidence to show the appellant robbed Johnson, one of two victims of the robberies charged in indictment.

One Johnson and one Ussery testified that they were the victims of assault and robbery committed by six or seven young males. Johnson could not identify any of the culprits. Ussery and the appellant each

testified that the appellant did not take part in assaulting and robbing Johnson. The evidence was therefore insufficient to convict the appellant of robbing Johnson.

ARGUMENT

A. THE POLICE OFFICER LACKED SUFFICIENT INFORMATION TO HAVE PROBABLE CAUSE TO ARREST THE APPELLANT.

When the officer arrested the appellant he obtained from his person two watches and a penknife. Before and during the trial the appellant moved to suppress this evidence, claiming the arrest was unlawful. The court received these items in evidence. The question therefore is whether the arrest was lawful.

Since there was no arrest warrant the officer was required to have probable cause to believe that an offense had been committed and that the appellant committed it. At the outset we admit that there is a difference in the proof of guilt and of probable cause, respectively. "In dealing with probable cause ... we deal with probabilities. These are not technical; tney are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). And see Draper v. United States, 358 U.S. 307 (1959); and Ker v. California,

374 U.S. 23 (1963); Paris v. United States, 116 U.S. App. D.C. 112, 321 F.2d 378 (1963); Tindle v. United States, 117 U.S. App. D.C. 27, 325 F.2d 223 (1963); Bailey v. United States,-U.S. App. D. C.-, No. 20,623 decided December 14, 1967.

The circumstances of the arrest warrant the conclusion that the officer lacked probable cause to believe that the appellant had robbed Ussery. After listening to Ussery's accusation, the officer approached the appellant and told him what Ussery had said. The appellant denied committing the crime, and in a calm, courteous, cooperative manner he responded to the officer's questions. He was not excited and agitated as was his accuser who probably was under the influence of alcohol. There was absolutely nothing about the appellant's speech, demeanor or appearance or his lawful presence in a group of policemen and other persons which should have aroused the suspicions of the officer and cause him to believe Ussery and disbelieve the appellant. This Court must have strong doubts about the sufficiency of the information which was the basis of the arrest. In addition to the foregoing facts, the officer did not know either Ussery or the appellant. The total information of the arresting officer did not give him probable cause for the arrest. The officer's

training and experience should have impelled him to weigh the probabilities of error of Ussery's identification of the appellant. A cautious and prudent policeman would have hesitated to believe Ussery under the circumstances of the time, place and surroundings of the accusation and denial. Bailey v. United States, supra; Paris v. United States, supra, Tindle v. United States, supra.

Several cases in the District of Columbia support our contention. In United States v. Castle, 138 F. Supp. 436 (D.C.D.C. 1955) the arresting officer not only had a tip from an informer that defendant had committed a crime but when the officer arrived at defendant's home, defendant threw an object behind the door and reached into his pocket. Even this was not enough to justify an arrest. The court ruled that the officer did not have probable cause to arrest defendant. Here, by contrast to the Castle case, the appellant did not respond to the police inquiry in a manner which would indicate guilt.

As we understand, in cases where the court has upheld the validity of an arrest without a warrant, the arresting officer has relied on something more than the mere accusation of a complaining witness. In some instances, the officer knew the complaining witness to be reliable from past dealings with him,

Franklin v. United States, 204 A.2d 341 (D.C. Ct. App. 1964), Wrightson v. United States, 98 U.S. App. D.C. 377, 236 F.2d 673 (1956). In others, suspicious actions of the accused lent credence to the accusation against him. McFarland v. United States, 163 A.2d 627 (D.C. Mun. Ct. App. 1960). Here we have neither circumstance.

B. THE TRIAL JUDGE SHOULD HAVE GRANTED THE MOTION TO SUPPRESS THE EVIDENCE OBTAINED BY THE SEARCH FOLLOWING THE ARREST.

Two watches and a penknife found on the appellant's person were admitted in evidence over objection. When a search is made incident to an arrest, the validity of the search turns upon the lawfulness of the arrest. And if the arrest is unlawful in its inception it remains so. Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U. S. 10 (1948). Hence the arrest may not be justified by what is disclosed upon a subsequent search. If the arrest is illegal, the search pursuant to it is also illegal. Therefore any items seized are inadmissible in evidence. Henry v. United States, 361 U.S. 98 (1959); Giordenello v. United States, 357 U.S. 480 (1957); Bowling v. United States, 122 U.S. App. D.C. 25, 350 F.2d 1002 (1965). Since the arrest of the appellant was without probable cause and without a

warrant, the search was illegal and the motion to suppress should have been granted.

C. THE TRIAL JUDGE SHOULD HAVE RULED THAT THE PROSECUTOR MUST ADDRESS THE APPELLANT BY HIS PROPER NAME AND NOT AS "MR. DEFENDANT."

We have shown in our statement of facts that the Assistant United States Attorney addressed the appellant as "Mr. Defendant," that the Court overruled counsel's objection to this kind of address and that the prosecutor thereupon repeated the same procedure. Since the printed page cannot graphically reflect the tone and inflection of his voice, we can only imagine what in fact they were and what sub-conscious effect they had on the jury. Moreover, the reason for the trial judge's behavior as to this matter is not apparent, particularly in view of the strong, though contradicted evidence of the government.

In Armstead v. United States, 121 U.S. App. D.C. 22, 347 F.2d 806 (1965) this Court at page 23 said:

> When a defendant takes the stand he is a witness; he is entitled to the same form of address, the same courtesies and considerations as all others involved in the proceeding. The presumption of innocence, apart from other factors, requires no less than that nothing be permitted to trench on that presumption.

It is clear that in a case such as that of the appellant, the integrity of his constitutional and other rights, including the presumption of innocence and conviction only beyond a reasonable doubt should be kept protected. The tactic of the prosecutor could weaken the bulwark the law has created to safeguard the interests of a person tried for crime. In the situation before this Court the failure of the prosecutor to address the appellant by his true name could well have prejudiced him in the minds of the jury.

D. THE TRIAL JUDGE'S INSTRUCTION, OVER THE APPELLANT'S OBJECTION, ON THE PERMISSIBLE INFERENCE OF RECENTLY STOLEN PROPERTY WAS PREJUDICIAL.

A reading of the trial judge's instruction on the permissible inference of guilt (T. Vol. II 95-97, Appendix A) shows that it was prejudicial to the appellant. It was unclear, incomplete and misleading. The judge told the jury in effect that it could disregard the appellant's explanation of his possession of the stolen articles if it was true but contradicted. Nowhere did the judge define the concept of "contradiction" and the jury may have had the impression that even though the explanation was true it had to be rejected. In the context of the instruction the element of "contradiction" was prejudicial to the appellant.

E. THIS INSTRUCTION ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT ON THE EXPLANATION OF HIS POSSESSION OF THE RECENTLY STOLEN ARTICLES.

Both the prosecution and the defense gave evidence to explain the appellant's possession of the recently stolen property. One government witness testified that he perceived the appellant steal two of the three items in evidence. The appellant testified that he found them while taking a walk. This direct conflict between two witnesses presented a real question of fact for the jury. It was on a point which went to the very essence of the case. It should therefore have precluded the use the permissive - inference rule against the appellant since, on the prosecution's theory, its witness knew all the material facts on the question of how the appellant came into possession of the articles. It thus appears that the instruction in question (a) erroneously relieved the prosecution of its burden of proof in relation to the testimonial explanation by its alleged eye-witness to the robbery of the defendant's possession and (b) wrongfully invaded the province of the jury on a pure factual issue.

In a criminal case the Government has the burden of proving beyond a reasonable doubt every element necessary to constitute the crime charged.

Davis v. United States, 160 U.S. 469, 487 (1895). This burden of proof never shifts. Ibid.; 9 Wigmore on Evidence, §2489(a)(3rd Ed. 1940). In view of the prosecution's contention that its eyewitness observed the appellant commit the robbery and that therefore the appellant was not peculiarly and exclusively the only person who knew how he obtained possession, there was no need or warrant for compelling the appellant to make an explanation satisfactory to the jury at the risk of conviction if he failed to do so.

We are unaware of any discussion of this specific point by this Court or any other federal court but we do refer to three state-court cases.

In People v. Kubulis, 298 Ill. 523, 131 N.E. 595 (1932) the court at page 598 said:

> Further, the law does not impose upon one accused of larceny the burden of satisfactorily explaining his possession of stolen property. It is sufficient to require an acquittal if from all the evidence there is a reasonable doubt of the defendant's guilt. Miller v. People, 229 Ill. 376, 82 N.E. 391.

And in State v. Davis, 214 Iowa 329, 242 N.W. 51 (1932) the court stressed the continuing presumption of innocence and at page 53 said:

> The law does not require the appellant to prove his possession was innocently obtained...The effect of the instruction given by the trial court was to place the

> burden upon the defendant to overcome what the court designated as a presumption arising from what is claimed to be the possession of the recently stolen car by the defendant.

We refer this Court to the cogent analysis of this problem in State v. Harrington, 176 N.C. 716, 96 S.E. 892-893 (1918). The court stressed the doctrines (a) that in a criminal case it is not incumbent on the defendant to take the burden of raising a reasonable doubt as to his guilt, (b) that there is a presumption of his innocence, and (c) that the burden is upon the state throughout the trial to exclude all such reasonable doubts. Speaking of the instruction in the Harrington case, the court said that it was calculated to mislead the jury into the error that the guilt of the defendants turned upon whether their explanation was a satisfactory one. The court observed that the question of guilt should have been made to turn upon all the evidence of the state and the defendants. The sole inquiry should therefore have been whether the state had carried successfully its proper burden and satisfied the jury beyond a reasonable doubt of their guilt. The court held that the instruction in fact put the burden on them to explain the possession satisfactorily with the consequence of guilt impliedly intimated if they failed to do so. At page 893 the court said:

> The rule of law, which presumes innocence and places the burden upon the state to show guilt beyond a reasonable doubt, was practically nullified, although it was generally in another part of the charge, that such was the rule.

These doctrines apply equally to the case at bar. The appellant's explanation was plausible, particularly because if he had committed the robberies of both Ussery and Johnson he very probably would have had in his possession when arrested the $12 and the wallet Johnson said were taken from him. We submit that on the entire record the trial judge's instruction on permissible inference of guilt based on possession was so unfair, prejudicial and erroneous that it violated the appellant's rights under the Fifth and Sixth Amendments. Lisenba v. California, 314 U.S. 219, 236 (1941); Buchalter v. New York, 319 U.S. 427, 429 (1943); Patton v. United States, 281 U.S. 271 (1930).

The appellant was entitled to have the jury determine which explanation, that of Ussery or that of the appellant, was credible. This finding by the jury should have been made under circumstances where the prosecution's burden of proof would not shift and the appellant would not be subjected to a greater measure of persuasion on his explanation of his possession than was put on the witness for the prosecution. See Brooks v. United States, 240 F.2d

905 (5 Cir. 1957); City of Richmond v. Atlantic Co., 273 F.2d 902, 916 (4 Cir. 1960); State v. Price, 59 Wash. 788, 370 P.2d 979 (1962).

F. THE EVIDENCE FAILS TO SUPPORT THE APPELLANT'S CONVICTION OF ROBBERY OF JOHNSON.

As we have shown above, Johnson was the victim of an alleged robbery in which a watch, a wallet and $12 were taken. He could not identify anyone as the robber, and Ussery and the appellant both testified that the appellant did not take part in the robbing of Johnson. The conviction of the appellant on the count of robbing Johnson should therefore be reversed.

CONCLUSION

For the reasons stated, the judgment of conviction should be reversed. Depending on the basis of reversal, the District Court should be instructed to enter a judgment of acquittal, or a new trial should be ordered.

Respectfully submitted,

MILTON A. KALLIS
Attorney for Appellant
Appointed by this Court

APPENDIX A

Trial Court's Instruction to Jury on Permissive Inference of Guilt From Possession of Recently Stolen Property (Transcript Pages 95-97)

Now ladies and gentlemen of the jury, you are instructed that in this case evidence has been introduced to show that the defendant Willie Pendergrast was found in exclusive possession of recently stolen property.

It is a rule of law that when recently stolen property is found in the exclusive possession of someone, the jury may infer from the fact of such possession that the possessor of the property was the thief.

If from the evidence you should be convinced beyond a reasonable doubt that the property was in the possession and that the property was stolen, and the property was in the possession of the defendant soon thereafter, then you may -- or it must be in the exclusive possession of the defendant -- then in those circumstances you may take them all into consideration in reaching your verdict.

Now unless there is an exception to that, ladies and gentlemen of the jury, that unless such possession is satisfactorily explained by the facts

and circumstances brought out at the trial, the fact of such possession is a sufficient basis to warrant your inferring or finding the defendant guilty.

The Court instructs the jury, however, that while you are permitted under the law to draw an inference of guilt from the fact that the defendant was discovered in exclusive possession of stolen property, you are not required to do so.

In other words, you are not required to infer guilt. Nor if you do draw the inference, you are not required that this particular fact alone be required to find the defendant guilty, although of course you may do so.

If the defendant's explanation of the possession of the property is in your opinion truthful, if it is consistent, if it is apparently honest, if it is not contradicted, if it is the same at all times, then if it has the indicia of a truthfulness, then the possession by the defendant may not be a basis for an inference of guilt.

But if it is not explained to your satisfaction you are permitted but not required in that event to find the defendant guilty of the offense.

Placing that in a very few words, ladies and gentlemen of the jury, the question of the possession of recently stolen property is a question for you to

decide. You may draw the inference and you may not draw the inference, if you should so desire.

You have heard the explanation and you may accept the explanation or you may wish to reject the explanation. It is entirely within your discretion.

APPENDIX B

Constitutional Provisions Involved

1. Article III in part provides:

   The trial of all crimes, except in cases of impeachment, shall be by jury.

2. The Fifth Amendment in part provides:

   No person shall....be deprived of life, liberty, or property without due process of law.

3. The Sixth Amendment in part provides:

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury.

196

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,031

WILLIE E. PENDERGRAST, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
WILLIAM G. REYNOLDS, JR.,
Assistant United States Attorneys.

Cr. 448-66

QUESTIONS PRESENTED

1) Did the police have probable cause to arrest appellant and seize the recently stolen items in his possession when—

a) The victim of a recent street robbery approached the police officers and identified appellant as one of the men who beat and robbed him ten to fifteen minutes earlier;

b) At the time of the complaint, the victim was bleeding and had bruises about his face as a result of the recent attack upon him?

2) Did the trial court's instruction on the permissible inference which the jury could draw from appellant's possession of recently stolen property properly inform the jury of the law on that issue?

3) Was the evidence sufficient to withstand appellant's motion for judgment of acquittal on count two, the robbery of complainant Johnson?

4) Was the appellant prejudiced by the intonations and manner of address of the prosecutor where the record contains absolutely nothing to support appellant's allegation that the prosecutor's intonation and manner were disrespectful?

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,031

WILLIE E. PENDERGRAST, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In the early morning hours of February 19, 1966, Henry Ussery and Grady Johnson were beaten and robbed in the 1600 block of F Street, Northeast, in the District of Columbia. On April 18, 1966 the Grand Jury indicted the appellant in two counts for robbery.[1] On February 21, 1967, after a plea of not guilty had been entered, appellant's trial commenced before Judge Leonard P. Walsh and a jury. Appellant was found guilty as charged in both counts and on April 21, 1967 was committed to the custody of the Attorney General under the provisions

[1] 22 D.C. Code § 2901.

of the Federal Youth Corrections Act[2] for a maximum period of eight years on each count. The sentences were to run concurrently. This appeal followed.

The Government's Direct Case

At approximately 12:30 a.m. on February 19, 1966, Henry Ussery and his friend Grady Johnson had just finished a game of checkers at the house Ussery shared with his girlfriend at 1601 F Street, N.E. (Tr. 20). They had consumed a few beers and a pint of whiskey during the evening but were not drunk (Tr. 83). The two men left the house and proceeded down F Street on the way to Johnson's house in the 1700 block of Seventeenth Street. When they had gone about a half a block, Ussery noticed a group of six or seven men standing in the street together. (Tr. 20.) One of the group approached and asked Ussery for a match. When Ussery replied that he did not smoke, several of the group jumped on him, knocked him down and kicked him (Tr. 20, 21). At that point, one of the group, identified by Ussery as the appellant, Willie E. Pendergrast, pulled him up and said, "What have you got? Give me some money and I will let you go". (Tr. 21, 22). When Ussery replied that he had no money, the appellant reached into his (Ussery's) pocket and removed his watch and said: "This is the same as money." (Tr. 21). When Ussery looked straight at the appellant, the appellant proceeded to hit him again, knocking him down and cutting his eye (Tr. 22). Before Ussery was able to escape, the appellant also removed a small pen knife which was in a closed position in Ussery's pocket. (Tr. 22.) Ussery testified that he got a good look at the appellant's face while he was being robbed from a distance of approximately one foot. (Tr. 28.) After the robbery, the robbers escaped down a nearby alley (Tr. 61).

While Ussery was being beaten and robbed by appellant and several unidentified men, approximately three

---

[2] 18 U.S. Code § 5010(c).

other men from the original group of six or seven jumped on Grady Johnson, knocked him down, and started hitting and kicking him. (Tr. 53, 67, 77.) One of the men reached into Johnson's pocket and took a small amount of money. They also took his pocketbook and his watch (Tr. 78). During this assault, Johnson's peg leg was jarred loose, and his glasses were knocked off making it difficult for him to see (Tr. 80). Johnson was unable to identify any of his assailants (Tr. 79, 86-87, 90).

Approximately ten to fifteen minutes after the robbery, the complaining witness, Henry Ussery, approached police officer Arthur Delaney who, along with his partner Private Rudolph Scipio, had responded to the general area of the robbery in response to a reported shooting (Tr. 93, 95). Mr. Ussery was bleeding and had bruises about his face as a result of the recent assault upon him (Tr. 95, 110). Mr. Ussery told Officer Delaney that he and Mr. Johnson had just been beaten and robbed (Tr. 93, 107, 121). He then pointed to the appellant who was standing in the crowd which had gathered around the police car and identified him as one of the robbers (Tr. 93, 100). Mr. Ussery continued to point at the appellant and said repeatedly: "That is the man." (Tr. 101.) Officer Scipio then informed the appellant of the accusation against him, arrested him and made a search incident to the arrest (Tr. 109). Recovered from the appellant's person was the watch which had been stolen from complainant Grady Johnson and the watch and pen knife which had been stolen from complainant, Henry Ussery (Tr. 109). The three items were moved into evidence without objection (Tr. 109).

The Appellant's Defense

The appellant's defense, presented entirely through his own testimony, was that he did not participate in the robbery of complainants Ussery and Johnson. He testified that he got "high" at a party the night of February 19, 1966, came out of the party at approximately 11:45 for the purpose of taking a walk and witnessed a scuffle

between several men on F Street (Supp. Tr. 18). At that point appellant testified that he saw the two watches and the pen knife belonging to complainants Ussery and Johnson on the side of the street. He then proceeded to pick them up and returned to the party with them in his possession (Supp. Tr. 18). When asked by the prosecutor what he was going to do with the two watches and the knife, the appellant replied that he was going to keep them (Supp. Tr. 41).

During the course of the cross-examination, the prosecutor addressed the appellant twice as "Mr. Defendant." (Supp. Tr. 23, 24). Counsel for the appellant objected and suggested that he would prefer his client to be addressed as "Mr. Pendergrast". The Court ruled that it was perfectly permissible for counsel to refer to the appellant as "Mr. Defendant", or by his proper name (Supp. Tr. 24). Counsel for appellant referred to his client as "Willie" at several points during the trial (Tr. 71, 72, 73, 74, 75, 77).

Instructions

On the issue of the consequences of possession of recently stolen property the court gave the following instructions:

> Now ladies and gentlemen of the jury, you are instructed that in this case evidence has been introduced to show that the defendant Willie Pendergrast was found in exclusive possession of recently stolen property.
>
> It is a rule of law that when recently stolen property is found in the exclusive possession of someone, the jury may infer from the fact of such possession that the possessor of the property was the thief.
>
> If from the evidence you should be convinced beyond a reasonable doubt that the property was in the possession and that the property was stolen, and the property was in the possession of the defendant soon thereafter, then you may—or it must be in the exclusive possession of the defendant—then in those

circumstances you may take them all into consideration in reaching your verdict.

Now unless there is an exception to that, ladies and gentlemen of the jury, that unless such possession is satisfactorily explained by the facts and circumstances brought out at the trial, the fact of such possession is a sufficient basis to warrant your inferring or finding the defendant guilty.

The Court instructs the jury, however, that while you are permitted under the law to draw an inference of guilt from the fact that the defendant was discovered in exclusive possession of stolen property, you are not required to do so.

In other words, you are not required to infer guilt. Nor if you do draw the inference, you are not required that this particular fact alone be required to find the defendant guilty, although of course you may do so.

If the defendant's explanation of the possession of the property is in your opinion truthful, if it is consistent, if it is apparently honest, if it is not contradicted, if it is the same at all times, then if it has the indicia of a truthfulness, then the possession by the defendant may not be a basis for an inference of guilt.

But if it is not explained to your satisfaction you are permitted but not required in that event to find the defendant guilty of the offense.

Placing that in a very few words, ladies and gentlemen of the jury, the question of the possession of recently stolen property is a question for you to decide. You may draw the inference and you may not draw the inference, if you should so desire.

You have heard the explanation and you may accept the explanation or you may wish to reject the explanation. It is entirely within your discretion.

The appellant objected to this instruction.

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

Rule 30, Federal Rules of Criminal Procedures, provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. As amended February 28, 1966, effective July 1, 1966.

SUMMARY OF ARGUMENT

I

In this case, the victim of a recent robbery, still bleeding and with bruises on his face as a result of the robbery, pointed appellant out of a group standing on the street and identified him as one of the robbers. This identification occurred within fifteen minutes of the robbery and was close to the scene of the crime. Based on this

evidence, the police officers had ample probable cause to arrest the appellant and seize the stolen property in his possession. The fact that the victim had been drinking earlier in the evening does not alter the result.

II

The trial court properly instructed the jury that it could, but was not required to, infer appellant's guilt if the Government established beyond a reasonable doubt that appellant was in possession of the recently stolen items. The Court's instruction did not shift the burden of proof. Moreover, the court's instruction, taken as a whole, properly informed the jury that if they believed the appellant's explanation, they were not permitted to infer the appellant's guilt from his recent possession.

III

The evidence was sufficient to withstand appellant's motion for judgment of acquittal on count 2, the robbery of the complainant, Grady Johnson. Even assuming arguendo that appellant's argument has merit, this court need not consider the matter since appellant's sentence on count 1 is to run concurrently with his sentence on count 2.

IV

The prosecutor's reference to the appellant as "Mr. Defendant" was not improper. Nothing in the record indicates that the prosecutor's manner of addressing the appellant was anything but respectful and proper. Appellant's argument that the prosecutor's tone of voice should be imagined to be prejudicial to the appellant is completely unsupported by anything in the record and hence is improper appellate argument.

ARGUMENT

I. The police officers had ample probable cause to arrest the appellant and seize the stolen property in his possession.

(Tr. 95, 110)

The victim of a street robbery, Mr. Ussery, approached Officers Delaney and Scipio approximately ten to fifteen minutes after the robbery and told the officers that he had been beaten and robbed. As he was talking, the officers noted that Mr. Ussery was bleeding and had bruises about his face (Tr. 95, 110). Mr. Ussery then pointed to the appellant who had joined the crowd which had gathered not far from where Officer Scipio was standing and identified him as one of the robbers. Officer Scipio then arrested appellant, and on searching him found the articles which had been stolen approximately fifteen minutes earlier from the complainants. Relying on a case in which the reliability of an informer's tip was challenged,[3] appellant contends that this prompt, on-the-spot identification by a victim of the robbery did not give the officers probable cause to arrest and search the appellant.

Here, the police source of information was a victim who had just been robbed ten to fifteen minutes before his report to the police. In *Brown* v. *United States*, 125 U.S. App. D.C. 43, 46, 365 F.2d 976, 979 (1966) this Court said:

> "That the information came from an unknown victim of the crime did not preclude the policemen's having probable cause to arrest appellant on the basis of it. Although the police could not here judge the reliability of the information on the basis of past experience with the informant, compare *Draper* v. *United States*, 358 U.S. 304 (1959), the victim's report has the virtue of being based on personal observation, a factor stressed in *Aguilar* v. *United*

[3] *United States* v. *Castle*, 138 F. Supp. 436 (D.D.C. 1955).

States, 378 U.S. 108 (1964), and is less likely to be covered by self interest than is that of an informant.

We think *Brown* conclusively disposes of appellant's argument that the police cannot rely on information coming from an anonymous victim of the crime. Indeed, in *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961), this Court held that probable cause for arrest existed when someone described only as a citizen reported to police that some person tried to "flimflam" him and pointed to a car emerging from a parking lot at a high rate of speed and said "there's the man there," indicating the defendant Payne, the driver. The police at that point had no information to rely on the victim's reliability or veracity, but their reliance on the fresh complaint from an unknown victim was upheld. See also *Cormier* v. *United States*, 137 A.2d 212 (D.C. Ct. App. 1957);[4] *Kennedy* v. *United States*, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965); *cf. Naples* v. *United States*, 113 U.S. App. D.C. 281, 283, 307 F.2d 618 (1962). If the rule were otherwise, we think it would impose an unjustifiably harsh restraint on police, for it would force them, when informed by one who purports to be the victim of a recent felony, to suspend pursuit of the suspect prior to checking on the reputation and veracity of their source.

Moreover, here the information given the police was corroborated by other evidence not present even in *Payne*, *supra*. The victim, Mr. Ussery, had fresh bruises on his face and was bleeding at the time he identified appellant just fifteen minutes after the robbery. Those bruises and

---

[4] In *Cormier*, a nine year old girl approached two police officers. In a hysterical state, she told the police officers that she had gone to look for her fourteen year old sister in a certain house and had been chased out and that there was a man with a gun in the house. She also told police that this man's car, bearing Virginia license plates, was parked in front of the house. The court held that this was sufficient to support a reasonable belief that an offense was being committed in the house. The officers in *Cormier* had no basis for their belief other than what was related to them by the nine year old girl.

blood along with the fact of appellant's presence near the scene of the crime served to bolster and corroborate Mr. Ussery's complaint that he had recently been beaten and robbed.

II. The court properly instructed the jury that if it found beyond a reasonable doubt that the appellant was in exclusive possession of the recently stolen property, it could, but was not required to, find that appellant had stolen said property.

The court gave the following instruction on the permissible inference which may arise from appelant's exclusive possession of recently stolen property:

> Now ladies and gentlemen of the jury, you are instructed that in this case evidence has been introduced to show that the defendant Willie Pendergrast was found in exclusive possession of recently stolen property.
>
> It is a rule of law that when recently stolen property is found in the exclusive possession of someone, the jury may infer from the fact of such possession that the possessor of the property was the thief.
>
> If from the evidence you should be convinced beyond a reasonable doubt that the property was in the possession and that the property was stolen, and the property was in the prossession of the defendant soon thereafter, then you may—or it must be in the exclusive possession of the defendant—then in those circumstances you may take them all into consideration in reaching your verdict.
>
> Now unless there is an exception to that, ladies and gentlemen of the jury, that unless such possession is satisfactorily explained by the facts and circumstances brought out at the trial, the fact of such possession is a sufficient basis to warrant your inferring or finding the defendant guilty.
>
> The Court instructs the jury, however, that while you are permitted under the law to draw an inference of guilt from the fact that the defendant was discovered in exclusive possession of stolen property, you are not required to do so.

> In other words, you are not required to infer guilt. Nor if you do draw the inference, you are not required that this particular fact alone be required to find the defendant guilty, although of course you may do so.
>
> If the defendant's explanation of the possession of the property is in your opinion truthful, if it is consistent, if it is apparently honest, if it is not contradicted, if it is the same at all times, then if it has the indicia of a truthfulness, then the possession by the defendant may not be a basis for an inference of guilt.
>
> But if it is not explained to your satisfaction you are permitted but not required in that event to find the defendant guilty of the offense.
>
> Placing that in a very few words, ladies and gentlemen of the jury, the question of the possession of recently stolen property is a question for you to decide. You may draw the inference and you may not draw the inference, if you should so desire.
>
> You have heard the explanation and you may accept the explanation or you may wish to reject the explanation. It is entirely within your discretion.

Appellant contends that this instruction is misleading and prejudicial in that it shifted the burden of proof from the Government to the appellant.

This formulation is a correct statement of the law as enunciated in *Travers* v. *United States*, 118 U.S. App. D.C. 276, 335 F.2d 698 (1965); *Bray* v. *United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962); *Tractenberg* v. *United States*, 53 App. D.C. 396, 293 Fed. 476 (1923). In *Travers*, *supra* at 278 this Court restated the well established rule that "the unexplained possession of goods lately stolen permits, but does not require, the inference that the possessor was a thief, even thought there was no direct evidence of the larceny."

In the instant case the trial court did not direct the jury to find appellant guilty if they found him in possession; it did not attempt to shift the burden of explaining possession to appellant; it merely correctly stated to the

jury the inference they might draw from the unexplained possession of the recently stolen items, but which they were not required to draw.[5] Preceding this instruction the court gave the jury full and correct instructions concerning the burden of proof which the Government was required to sustain in order to justify a conviction.

The Court's charge taken as a whole also clearly informed the jury that if it believed the appellant's explanation of how he innocently came into possession of the property, it could not infer his guilt from possession. At one point in its charge, the Court instructed that "unless such possession is satisfactorily explained by the facts and circumstances brought out at trial," the jury was permitted to make the inference of guilt from the appellant's exclusive possession. Again later in its charge, the trial court repeated that the jury had it within its discretion to accept or reject the appellant's explanation. Hence, appellant's argument that the trial court told the jury to find the appellant guilty if it found appellant's explanation true but contradicted is not an accurate interpretation of the charge. Indeed, appellant's objection at trial was to the giving of any instruction on the permissible inference of recently stolen property and not to a specific inadequacy in the instruction itself. If the appellant had any objection to the use of the word "Contradicted" in the Court's instruction, he was required to bring that objection to the Court's attention before the jury retired. A general objection to the giving of any instruction on the issue of possession of recently stolen property does not suffice to allow the appellant to raise a specific objection on appeal. Federal Rules of Criminal Procedure, Rule 30; *Nabob Oil Co.* v. *United States*,

---

[5] We consider untenable appellant's argument that the instruction should not have been given because the Government also presented some direct evidence of appellant's guilt. We submit that appellant cannot be heard to say on appeal that in effect the Government presented too much evidence of his guilt; therefore some of it should be excluded to make the trial a fairer contest.

190 F.2d 478 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951). Significantly at the end of the Court's charge to the jury, the Court entertained any suggestions from counsel. Counsel for appellant made no objection or comment on the court's instruction with regard to recently stolen property. (Tr. 102). Indeed any inadequacy in the instruction was cured by the trial court toward the end of its charge when it informed the jury:

> "If the person would find the property in question on the ground, not having taken it from the person, then the defendant in this case would not be guilty of robbery." (Tr. 102).

Appellant seems to argue further that because he provided the jury with an explanation of his possession, no inference can be drawn from such possession. Appellant's brief, 19. Appellant, however, ignores one vital prerequisite—namely, that the explanation must satisfy the jury. *McAbee* v. *United States*, 111 U.S. App. D.C. 74, 294 F.2d 703 (1961). Whether the inference was overcome by the explanation is a question for the jury. *Keys* v. *United States*, 314 F.2d 119 (9th Cir. 1963). If it saw fit to do so, the jury could reject completely appellant's explanation. *Epps* v. *United States*, 81 U.S. App. D.C. 244, 157 F.2d 11 (1946). In fact, the jury did reject appellant's explanation. We believe the jury would have been naive indeed if it had found from the evidence that appellant came out of a party to take a walk, found the stolen items which the robbers happened to have dropped on the street, then picked them up innocently all within ten or fifteen minutes of the robbery. Even if the jury had disregarded the testimony of Mr. Ussery, who positively identified appellant as one of the robbers, appellant's explanation that his possession of the stolen items was pure happenstance, defies credulity.

III. There was ample evidence to sustain the jury's finding that appellant was a principle in the robbery of Grady Johnson.

Appellant contends that the trial judge erred in denying his motion for judgment of acquittal on count 2 charging robbery of Grady Johnson. The Government's evidence disclosed that the appellant had in his exclusive possession the watch which had been forcefully taken from the complainant Grady Johnson approximately ten or fifteen minutes earlier during the robbery (Tr. 109). Moreover, Mr. Ussery identified the appellant as one of a group of six or seven men who were standing on F Street when he and Johnson approached. Some of this group, including the appellant, beat and robbed Mr. Ussery. Others robbed Grady Johnson of his watch, approximately $12 and a wallet. (Tr. 78). Later this group escaped down a nearby alley.

Assuming the truth of the Government's evidence and viewing it in the light most favorable to the Government, as the trial court, and this Court must, there was ample evidence from which the jury might or might not have found the appellant guilty beyond a reasonable doubt of the robbery of Grady Johnson. *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947). Even assuming, *arguendo* that appellant's argument has merit since the sentences for the two robbery counts are to run concurrently, it is unnecessary for this Court to review the matter. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

IV. The prosecutor's reference to appellant as "Mr. Defendant" was respectful and proper and in no way constituted error.

(Tr. 71, 72, 73, 74, 75, 77; Supp. Tr. 23, 24)

The prosecutor addressed the appellant twice during cross-examination as "Mr. Defendant". When the appel-

lant's counsel objected the trial court ruled that it was permissible to address the appellant as "Mr. Defendant" or by his proper name. Although nothing in the record reflects that the prosecutor or the trial court addressed appellant in anything other than a respectful manner, appellant now contends that:

> "Since the printed page cannot graphically reflect the tone and inflection of his (the prosecutor's) voice, we can only *imagine* what in fact they were and what subconscious effect they had on the jury." Brief for Appellant, 14.

Such an argument strays from the record and is untenable. If it is thought that the intonations of the prosecutor or trial judge are prejudicial to the defendant, counsel has an affirmative duty at the time such prejudice arises to make an accurate record showing what actually occurred. *Coca Cola Bottling Works, Inc.* v. *Hunter*, 95 U.S. App. D.C. 83, 219 F.2d 765 (1955); *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950). Here, counsel merely objected to the prosecutor's characterization of the appellant as "Mr. Defendant" and said nothing about the tone or reflection of voice.[6] To argue on appeal that the prosecutor's tone of voice was somehow prejudicial to the defendant is completely unfounded on the record and hence impossible to answer intelligently on appeal.[7]

---

[6] This case is not analagous to *Armstead* v. *United States*, 121 U.S. App. D.C. 22, 347 F.2d 806 (1965) where the trial judge forbade the prosecutor from addressing the appellant by his proper name.

[7] Although trial counsel for appellant indicated at one point that he preferred that his client be addressed as "Mr. Pendergrast" (Supp. Tr. 23, 24), he later referred to him several times as "Willie" (Tr. 71, 72, 73, 74, 75, 77).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
WILLIAM G. REYNOLDS, JR.,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 293602 651

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,031

WILLIE E. PENDERGRAST,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILTON A. KALLIS
(Attorney for Appellant
appointed by Order of
this Court)
743 Washington Building
1435 G Street, N. W.
Washington, D. C. 20005
Telephone: 783-1950

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,031

WILLIE E. PENDERGRAST,

Appellant,

v.

UNITED STATES,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

This reply brief will deal only with the questions involved in the trial judge's jury instruction on the permissive inference of guilt based on possession of recently stolen property.

There are major flaws in the Brief of Appellee in what it says as well as what it fails to say in relation to this instruction. Appellee misconceives

the very points of law controlling the disposition of the issues Appellant has presented. In our Main Brief we contended that the rule of permissive inference of guilt stems only from the peculiar and exclusive knowledge of the possessor as to how he acquired the property in question.

The Supreme Court has expressed this doctrine in cogent language. In Casey v. United States, 276 U.S. 413 (1928), Mr. Justice Holmes, speaking for the Court, at page 418 said:

> The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence §2494. It is consistent with all the constitutional protection of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence §2486. (Emphasis added)

Wigmore stated the same principle as follows:

> Still another consideration has often been advanced as a special test for solving a limited class of cases, i.e. the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity, if not true. (Emphasis that of author) (9 Wigmore, Evidence, 3ed., § 2486).

At the same place Wigmore stresses the considerations of fairness and experience in apportioning the burden of proof in a specific case. And Morgan, the eminent authority on Evidence, at page 27 of his Basic Problems of Evidence (1954), makes the same point.

According to the Government, the appellant did not have peculiar and exclusive knowledge of how he obtained possession of the articles received in evidence. Ussery, the Government's main eyewitness, testified that he, himself, saw the appellant rob him of his watch and knife. To require the appellant to give a satisfactory explanation of his possession at the risk of conviction and, at the same time, to exempt the Government from both this obligation and the risk of acquittal is to impose an unfair task on the appellant and to force him to carry the burden on a controlling issue.

In a case like that of the appellant there is no basis in experience and justice for a trial judge to favor the prosecution's witness and disfavor the defendant in terms of duty to explain possession of recently stolen property when each claims to be an eyewitness and their stories conflict irreconcilably. We therefore submit that the explanation of the prosecutor's witness as to how the appellant obtained possession of the stolen articles should have been

subjected to at least the same tests of credibility and the same risks of nonpersuasion as those imposed on the appellant.

The trial judge's instruction, standing alone, is basis for reversal. It was prejudicial for the reasons stated in our Main Brief. Further it was also unjust, and it both shifted the burden of proving innocence to the appellant and invaded the constitutional province of the jury to weigh each explanation only on the basis of the true factors of credibility.

Appellee has completely evaded the point discussed in this Reply Brief. Our contention is sound in principle and supported by the most respectable authority. It is therefore the duty of Appellee to enlighten the Court on this vital and substantial question. If the appellant's contention is untenable the United States Attorney should meet the issue rather than ignore it. We accordingly challenge him to show this Court why the permissive-inference-of-guilt rule should apply here when according to the Government's evidence, the facts pertaining to the possession by the appellant were not "peculiarly within" his "knowledge and hidden from discovery by the Government." (Justice Holmes' language quoted above from Casey v. United States, supra.

CONCLUSION

For the reasons stated in the appellant's Main Brief and in this Reply Brief, the judgment of the District Court should be reversed.

Respectfully submitted,

MILTON A. KALLIS
Attorney for Appellant
(Appointed by this Court)
743 Washington Building
1435 G Street, N. W.
Washington, D. C. 20005
Telephone: 783-1950